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IN THE

Supreme Court of the United States

MAY TERM, 1927.

MIDLAND VALLEY RAILROAD COMPANY, Petitioner vs. THOMAS BARKLEY, Et Al., Respondents	No.....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Midland Valley Railroad Company, respectfully petitions this honorable court to grant its writ of certiorari to the Supreme Court of the State of Arkansas and to remove therefrom to this court for review the record in the case, there lately pending, entitled Midland Valley Railroad

Company, appellant, v. Thomas Barkley, et al., appellees, being Number 9498 on the docket of that court, the petitioner herein being the appellant therein. The judgment of the Supreme Court of Arkansas became final on March 14, 1927 (291 S.W. Rep. p. 431). A duly certified copy of the entire record of said cause is herewith presented.

QUESTION PRESENTED

There were several questions involved in this case in the State Court, but the sole question desired to be presented to this court on this petition for certiorari is one of jurisdiction of the State Court. The respondents allege, as a basis for this action, a failure of the petitioner to supply its coal mine with coal cars during the period from August 1, 1922, to January 1, 1923. Under the Act of Congress, approved February 28, 1920, known as the "Transportation Act", and particularly Sections 12, 13, 14, and 15 of said Act, the Interstate Commerce Commission is given power to adopt rules and regulations with reference to the distribution of the available coal car supply, Section 15 providing:

> "Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Com-

mission shall have and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission, etc."

Section 2 of the Supplementary Act of Congress, approved September 22, 1922, provides:

"That the powers of the Interstate Commerce Commission under the Act entitled 'An Act to regulate Commerce,' approved February 4, 1887, as amended, including the Transportation Act, 1920, and especially under section 402 of said Transportation Act, 1920, are, during the aforesaid emergency, enlarged to include the authority to issue in transportation of coal or other fuel orders for priorities in car service, embargoes, and other suitable measures in favor of or against any carrier, including vessels suitable for transportation of coal on the inland waters of the United States, etc."

The question is as to whether these Acts of Congress, giving power to the Interstate Commerce Commission to adopt such rules and regulations with respect to the distribution of coal cars, are to govern or Sections 895 and 915, Crawford & Moses' Digest of the Statutes of Arkansas, which make it obligatory upon a railroad company to furnish all cars that are demanded in the manner provided by the statute. Your petitioner claims that the Acts of Congress, giving to the Interstate Commerce Commission authority to regulate the distribution of coal cars, are supreme, and that some violation of the orders of the Interstate Commerce Commission must be shown, and that the Commission has exclusive power and authority to determine that question before a suit for damages can be maintained.

The Supreme Court of Arkansas, in its opinion, states:

> "This is purely an action against the appellant company for its failure to furnish cars, which is its comman-law and statutory duty, both Federal and State. But the allegations of this complaint show that this action is bottomed upon appellant's alleged failure to comply with its common-law or contractual, as well as statutory duty, to furnish cars under Sections 895 and

915, C. & M. Digest. According to the above decisions of the U. S. Supreme Court and our own court, appellees had the right to maintain this action under Section 22 of the Interstate Commerce Act. It follows that the court did not err in overruling the appellant's demurrer to the complaint."

STATEMENT OF FACTS

The Supreme Court of Arkansas, in its opinion, states:

> "The testimony is exceedingly voluminous, and we deem it wholly unnecessary to set forth the testimony bearing upon the issue as to whether or not the appellant failed to furnish cars as alleged in the complaint, and, if so, the amount of damages appellees sustained by reason of such failure, because, if the trial court had jurisdiction of the action, we are convinced that the testimony was amply sufficient to sustain the verdict on the issue of whether or not the appellant failed to furnish cars and also as to the amount of damages which accrued to appellees by reason of such failure."

The respondents were engaged in operating what is termed a "wagon loading" mine about a mile from the petitioner's railroad. The complaint alleges,

as abstracted in the opinion of the Supreme Court, that:

> "From August 1, 1922, until January 1, 1923, during which time the appellant only furnished to appellees twelve coal-cars. The appellees alleged that the refusal of appellant to furnish coal-cars compelled appellees to shut down their mine. Appellees then set forth in detail the damages alleged to have accrued to them by reason of the alleged wrongful failure of the appellant to furnish coal-cars as demanded by the appellees."

There was a judgment in favor of the plaintiffs for the sum of $2,000.00 damages. The petitioner is precluded from controverting the issue as to whether or not cars were furnished as demanded, by the verdict of the jury, and, therefore, for the purpose of this petition it is conceded that the cars were not furnished as demanded, and the only question that remains to be determined is that of the jurisdiction of the State Court under the Arkansas statute in a suit for damages for a failure to furnish cars as demanded.

REASONS FOR THE ALLOWANCE OF THE WRIT.

(a) The question presented by this petition as

to whether or not the Congress has so legislated with reference to the distribution of the available coal car supply by the railroads of the United States that the common-law and state statutes on the subject are superseded.

(b) If the decision of the Supreme Court of Arkansas in affirming the judgment rendered against your petitioner in this case is permitted to stand, it will materially affect the distribution of the coal car supply by the railroads of the country, and will render nugatory the orders of the Interstate Commerce Commission pertaining thereto.

(c) This court will take judicial notice that the Interstate Commerce Commission has assumed full jurisdiction under the Act of Congress referred to, and has adopted rules and regulations governing the distribution of coal cars by all railroads in the United States (U.S. v. New River Co., 265 U.S. 534).

(d) The Supreme Court of Arkansas has in its opinion decided a federal question of substance and great importance, and not heretofore directly determined by this court, and it is very important that the Act of Congress should be construed by this court.

(e) The principle involved is one of serious importance to all railroads and to the operators

of coal mines in the United States, as it should be determined as to whether or not the statutes of the various states have been superseded by the Acts of Congress.

(f) The Supreme Court of Arkansas is the highest court of said state in which a decision of the question involved could be had.

BRIEF IN SUPPORT OF PETITION

I.

THIS COURT HAS JURISDICTION

The petitioner claims a right and immunity under the Act of Congress approved February 28, 1920, giving to the Interstate Commerce Commission exclusive jurisdiction in the matter of the distribution of the available coal car supply. This right was denied petitioner by the State Supreme Court. Therefore, this court has jurisdiction on certiorari.

Sec. 237 (b), Judicial Code as amended by the Act of February 13, 1925.

II.

SECTIONS 895 AND 915, CRAWFORD & MOSES' DIGEST, OF THE STATUTES, WERE SUPERSEDED BY THE ACT OF CONGRESS OF FEBRUARY 28, 1920.

This court, in the case of G. C. & S. F. Ry. Co., v. Hefley, 158 U.S. 98, said:

"The State statute and the national law

operate upon the same subject matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the State. The State statute must therefore give way."

The Supreme Court of Arkansas, in its opinion, states:

"Counsel for the appellant contend that it was the purpose of Congress, in the above enactments, to vest the Interstate Commerce Commission with supreme power in the matter of distribution of coal-cars, regardless of whether the coal was to be shipped in intra or interstate commerce. Counsel for appellant say: 'It is the contention of the defendant that all State statutes and common-law obligations are swept away, as far as the transportation of coal, or the furnishing of cars in which to transport the same, by the provisions of the Transportation Act, and the later emergency act of September 22, 1922.' We cannot agree with counsel in this contention."

It is further stated in the opinion of the Supreme Court of Arkansas:

"The appellant demurred to the complaint

on the ground that it did not state a cause of action within the jurisdiction of the court, that 'the act of Congress known as the Interstate Commerce Act, as amended by the Transportation Act and other acts of Congress amendatory thereof, confer exclusive authority upon the Interstate Commerce Commission in the matter of distribution of coal-cars and jurisdiction in matters of alleged failure to furnish the same.' Appellant's demurrer was overruled, and it answered, denying specifically the allegations of the complaint."

This court, in the case of United States of America v. New River Company, 265 U.S. 534, said:

"This suit was brought by the appellees against the Chesapeake & Ohio Railway Company and the Virginian Railway Company, competing interstate carriers by railroad, the United States, and the Interstate Commerce Commission, to enjoin the carriers from applying a certain rule (rule 4 of Circular CS-31, revised) for the distribution of coal cars, and to set aside the decision and order of the Commission of December 11, 1922, in certain proceedings instituted by the appellees against the defendant carriers. * * * These rules were established during the period of Federal control of the rail-

roads. After the expiration of that period, the Commission issued a notice, dated March 2, 1920, recommending to carriers and shippers that the rules be continued in effect until experience and further study demonstrated that others would be more effective and beneficial. They were continued by carriers generally."

III.

JURISDICTION OF STATE COURT.

The Supreme Court of Arkansas, in its opinion, further states:

> "Counsel for the appellees concede that the cars which it is alleged appellant failed to furnish were ordered for and to be used in interstate shipments. Such being the case, the provisions of Section 22 of the Interstate Commerce Act supra, confer jurisdiction upon the State Court. The question, we believe, is thoroughly settled against the contention of counsel for the appellant by decisions of the Supreme Court of the United States."

Section 22 of the Interstate Commerce Act referred to by the Supreme Court of Arkansas provides that:

> "Nothing in this act contained shall in any

way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

And the Supreme Court of Arkansas refers to the case of Pennsylvania Railroad Co. v. Puritan Coal Mining Co., 237 U.S. 121, and other cases decided long before the Act of Congress giving jurisdiction over the distribution of coal cars to the Interstate Commerce Commission.

The Supreme Court of Arkansas further says:

"The appellant sets up in his answer and makes an exhibit thereto various orders and rules of the Interstate Commerce Commission and the rules adopted by the United States Railroad Administration relating to the supply and distribution of coal-cars, which were in effect during the period covered by the appellees' action. We deem it wholly unnecessary to set out and comment upon these rules and the authorities upon which the appellant relies to support its contention that the State court was without jurisdiction. We have examined all these rules and considered the authorities, and especially the decision of the Interstate Commerce Commission in the case of Interstate Commerce Commission v. Victor American Fuel

Co. and Salt Lake Rd. Co., of July 20, 1926, and we are convinced that these authorities have no application. As we construe the complaint, no attack is made by the appellees upon the rules and orders of the Interstate Commerce Commission relating to the supply and distribution of cars by railroads for the shipment of coal. We cannot discover in the complaint any allegation to the effect that the rules and orders of the Interstate Commerce Commission are unreasonable or unfair, that these rules themselves result in unlawful or unreasonable practice or in unjust discrimination or undue prejudice to shippers. That would involve an administrative question over which the Interstate Commerce Commission alone would have jurisdiction."

The contention of the petitioner is that, the existence of the rules of the Interstate Commerce Commission being established, there must be some violation of those rules before a cause of action would exist for a failure to furnish cars as demanded.

This court, in the case of N.Y.C. & H. R.R. Co. v. Beaham, 242 U.S. 148, said:

"The transactions in question related to the the interstate commerce; consequent rights and

liabilities depend upon acts of congress, agreement between the parties, and common-law principles accepted and enforced in Federal Courts. *And the carrier is entitled to the presumption that its business is being conducted lawfully.* Citing.

Southern Express Co. v. Byers, 240 U.S. 612.
C. N. O. & T. P. R. Co. v. Rankin, 241 U.S. 319."

IV.

JURISDICTION OF INTERSTATE COMMERCE COMMISSION.

Under the Transportation Act, "it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to, or used by, any such mine for transportation of coal against the mine," and then gives to the Commission the power to determine whether the rules adopted by the carrier are reasonable.

In the case of Corona Coal Co. v. Southern Ry. Co., 266 Fed. 726, Judge Clayton rendered an exhaustive opinion on "the provisions of paragraph 12 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act of February 28, 1920," and after describing the method pursued in the distribution of coal cars says:

"This case draws the line of demarcation between that class of complaints which may be heard by the courts and the other class that must be dealt with by the commission. If the practice itself is attacked as unfair and discriminatory, the exercise of the judgment and discretion of the commission is called for; but until that body had declared the practice to be discriminatory and unjust no court has jurisdiction of an interstate carrier for damages occasioned by the operation of such practice."

This question is also discussed in the opinion rendered by Judge Westenhaver in the case of Cleveland & Western Coal Co. v. Baltimore & Ohio R.R. Co., 283 Fed. 995, and referring to the opinion of Judge Clayton in the Corona Coal Company case, he says:

"Judge Clayton's view also accords with the present view of the Interstate Commerce Commission, which now has pending before it the question of whether the assigned car rule as applied by defendant is a just and reasonable distribution of cars among coal mines. If I am right in this conclusion, then, whether defendants' method of car distribution is unfair or discriminatory becomes a question in the first instance for the Interstate Commerce Commis-

sion, and the courts may not intervene until after that Commission has heard and determined the question."

The Circuit Court of Appeals for the Fourth Circuit in the case of B. & O. R.R. Co. v. Lambert Run Coal Co., 267 Fed. 776, discusses fully the power of the Commission under the Transportation Act, 1920, and says:

"The Congress has not, however, conferred on coal mines equality among themselves—the right of each mine in time of coal car shortage to be furnished cars in proportion to mine ratings, without regard to the public welfare and safety. Coal is a public necessity. From many causes, crises and emergencies may arise in mine operation, transportation, and unexpected needs of the public, which can not be anticipated and justly provided for by inelastic legislative enactment. It would be strange indeed if the Congress had guarded the private interests of the mines by an inflexible enactment of equality, lodging nowhere the power to relieve the public against unforseen conditions which would make rigid proportionate distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

"We think the Congress has clearly conferred on the commission the power to grant relief in such conditions."

In the case of Director General of Railroads, et al, v. Viscose Co., 254 U.S. 498, Mr. Justice Clark, delivering the opinion of the Court, said:

"The contention of the carriers, faintly made, that the common law, and not the Interstate Commerce Act, furnished the measure of their obligation to the public, was promptly overruled by the Commission, informed, as it was, by wide experience in traffic affairs and in the administration of the act.

"The importance to the commerce of the country of the exclusive initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated." (Citing cases.)

CONCLUSION

Your petitioner respectfully submits that since the Transportation Act of February 28, 1920, and the later act of 1922, these two acts of Congress constitute the sole and supreme law governing the distribution of coal cars during the period alleged in the complaint, and that a suit for damages based upon alleged discrimination in furnishing cars or the failure to furnish a particular mine with cars necessarily involves a violation of these Acts of Congress and the orders of the Interstate Commerce Commission made thereunder, and such a suit cannot be based upon a common-law obligation or the statutes of Arkansas to furnish cars as they have been superseded by the Acts of Congress. It is respectfully submitted, therefore, that a writ of certiorari should be issued, as prayed.

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THOMAS B. PRYOR,
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